

## 5 KEY TAKEAWAYS

# Negotiating Cloud Contracts for SaaS, IaaS and PaaS

Kilpatrick Townsend's [Sonia Baldia](#) and [Jeff Connell](#) recently joined the Vice President & Deputy General Counsel for Cvent, [Ed Szeto](#), at the [Association of Corporate Counsel NCR Conference -- "In-House Primer: Exploring Key Topics Central to the Role of the General Counsel."](#) Throughout the day speakers addressed key issues a new general counsel or small law department lawyer will face in their role. Sonia, Jeff, and Ed discussed "In-House Counsel's Playbook for Negotiating Cloud Contracts for SaaS, IaaS and PaaS."

Key takeaways from their presentation include:

1

**Cloud adoption (SaaS, PaaS and IaaS) continues to accelerate.** Enterprises of all sizes across a variety of industries continue to adopt increasingly sophisticated cloud offerings in multi-tenant environments. Cloud market maturity, compelling benefits of the on-demand model, and accelerating digitalization precipitated by the pandemic have created a paradigm shift, with companies rapidly leveraging cloud solutions and electing to outsource data centers and other key operations to cloud service providers for agility, innovation, speed to market and cost savings, among other business drivers. Along with the benefits, significant risks must be contractually managed, but cloud contracts are here to stay!

2

**Stakeholder alignment is key for successful outcome.** When it comes to negotiating cloud contracts, no one size fits all. SaaS, PaaS, IaaS and multi-cloud environments present unique and complex legal, commercial and operational issues based on factors, such as the cloud offering scope, regulated or business sensitive data, or "nice to have" vs. "mission critical" solutions. Each cloud model shifts a certain degree of visibility and operational control from the customer to the cloud provider, compared to a traditional data center or on premise software. It is imperative for legal to align with business, infosec and other stakeholders on the organization's cloud strategy to be able to appropriately manage risk, negotiate for desired outcomes and shorten the deal cycle to keep up with business.

3

**Service levels are the cornerstone of cloud services.** A cloud service outage may seriously impair a customer's ability to perform business critical functions. Service levels are critical to ensuring that a customer may rely on the cloud services, to require appropriate remedies for service interruption and failure, and to incentivize provider to diligently remedy service availability issues. Further, while a broad range of warranties may be preferred in certain cloud agreements, the performance warranty is often of highest importance. During the sales process, sales teams may promise more than the cloud solution can actually deliver, which may not ultimately be reflected in the cloud contract. The performance warranty is instrumental to ensuring the cloud solution indeed meets the expected functionality and availability metrics.

4

**Data vulnerability remain top impediment.** Data in the cloud is at heightened risk of exposure. Unauthorized access, cyberattacks, denial of service attacks, unsecure APIs/interfaces, cloud infrastructure vulnerabilities, data theft, data breach and violation of data protection laws remain amongst the top concerns for cloud migration. To mitigate this risk, infosec must conduct thorough security assessments during due diligence, and the cloud contract must appropriately address who owns the generated data, how data may be used, where data will be stored or transferred, and what security and compliance measures are in place. Further, a provider should have an effective security incident response plan and adequate cyber insurance. Allocation of liability for data breach is often hotly negotiated in cloud contracts but certain best practices are emerging, narrowing the gap between customer and provider positions.

5

**Negotiate for appropriate allocation of liability.** Each cloud provider has a different threshold, and each customer has different leverage, in negotiating concessions. Even if the vendor cloud agreement is highly standardized, certain terms are usually negotiable. Particular attention should be paid to the liability caps, limitations and carve-outs, scope of indemnities, and exit rights. Understanding the interplay between the key contractual terms in cloud contracts, including service levels, warranties, compliance, indemnities, limitations on liability, force majeure and termination, against the business and operational realities is key to negotiating successful cloud contracts that contain an appropriate allocation of liability amongst the parties and that are commensurate with the deal value and transaction risk.

For more information, please contact Sonia Baldia or Jeff Connell:

[sbaldia@kilpatricktownsend.com](mailto:sbaldia@kilpatricktownsend.com)  
[jconnell@kilpatricktownsend.com](mailto:jconnell@kilpatricktownsend.com)

[www.kilpatricktownsend.com](http://www.kilpatricktownsend.com)